Supreme Court, U.S.
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No. 93-1193

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

LEX DALE OWENS,
Petitioner,
v.
THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for the Third Judicial District
of Texas at Austin

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Sixth Amendment require that counsel construct new legal theories and arguments in order to effectively represent a client?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	3
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	3
II. THE COURT BELOW APPLIED THE PROPER LEGAL STANDARD TO THE FACTS AND ITS CONCLUSION IS CORRECT.	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	**Page**
Anable v. Ford, 653 F.Supp. 22 (W.D.Ark. 1985)	5
Gomez v. State, 572 So.2d 952 (Fla.Dist.Ct.App. 1990)	5
Kimmelman v. Morrisson, 477 U.S. 365 (1986)	6
Powell v. State, 660 S.W.2d 842 (Tex.App. -- El Paso 1983, no pet.)	4,5
Strickland v. Washington, 466 U.S. 668 (1984)	3,4,5,6

Constitutions, Statutes and Rules

U. S. Const., amend. IV	2
U. S. Const., amend. VI	2
U. S. Const., amend. XIV	2
Tex. Const., art. V, § 6	4
28 U.S.C. § 1257	2
Sup. Ct. R. 10	3

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.[1]

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[1]For purposes of clarity, Petitioner will be referred to "Owens," and Respondent will be referred to "the state."

OPINION BELOW

The opinion of the Court of Appeals for the Third Judicial District of Texas affirming the denial of habeas corpus relief is published at 860 S.W.2d 727 (Tex.App. -- Austin 1993). The order of the Court of Criminal Appeals refusing the petition for discretionary review is unpublished and is attached to the petition as an appendix.

JURISDICTION

Owens seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Owens bases his claims upon the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Owens' statement of the case is substantially correct and the state accepts his characterization of the procedural history and the facts.

SUMMARY OF ARGUMENT

Owens presents no special or important reason for granting certiorari in this case. There are no disputes about the facts and the court below applied the proper legal standard in a correct manner in resolving the issue presented.

The court below determined that counsel's performance was not constitutionally deficient because the argument that Owens claim should have been made was not so readily available that the failure to employ it was professionally unreasonable. The tools, in the form of legal authority and analogous

principles, probably existed for constructing the argument. However, the argument itself was not one that had been widely accepted by courts in any jurisdiction. The Constitution requires that an attorney vigorously represent his client with the legal tools available, but it does not require him to advance the law into new areas in order to effectively fulfill his duty.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Owens has advanced no special or important reasons in this case, and none exists.

II.

THE COURT BELOW APPLIED THE PROPER LEGAL STANDARD TO THE FACTS AND ITS CONCLUSION IS CORRECT.

Owens contends that he received ineffective assistance of counsel at trial because his attorney failed to object to the state's use of his refusal to consent to a search of his luggage as evidence that he knew his belongings contained contraband. The court below found that counsel's performance was not deficient because it was not clearly established at the time of Owens' trial that such evidence could be excluded. Owens argues that, by so holding, the court of appeals extended the standard for determining attorney competence beyond what this Court required in *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Strickland*, the Court held that a criminal defendant alleging that his attorney's representation was constitutionally inadequate must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Reviewing courts must be "highly deferential" toward the attorney's performance, *id.* at 689, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* Recognizing that a detailed set of rigid rules to govern an attorney's actions in representing a client is neither necessary nor desirable, the Court reiterated that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

Despite Owens' characterization, the court of appeals did not create a new element for the *Strickland* standard in finding that counsel here was constitutionally effective. The court below surveyed the state of the law on the admissibility of a defendant's refusal to consent to a search at the time of the Owens' trial. *Ex parte Owens*, 860 S.W.2d at 730. It found that only one Texas court had addressed the question. *Powell v. State*, 660 S.W.2d 842 (Tex.App. -- El Paso 1983, no pet.). Although that court had held in favor of Owens' position, the court below was unable to conclude that one case, from a different appellate district,[2] provided sufficient authority to render counsel's performance unreasonable and unprofessional for failing to rely on it. *Ex parte Owens*, 860 at 730.

This is plainly a correct application of *Strickland*. Although the tools might be available for extrapolating from settled law to new applications, the question is whether counsel's performance was reasonable under prevailing professional

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[2]Court of appeals decisions are binding precedent only within the judicial district in which they are rendered. Trial courts and courts of appeals in other districts are free to disregard the decisions if they find the reasoning incorrect. Tex. Const., art. V, § 6.

norms. The court of appeals merely held that it is not professionally unreasonable for counsel to work within the parameters of settled law rather than to construct a novel argument in defending a client. Even though it might be desirable for attorneys always to try to extend the boundaries of the law to encompass the facts of their particular case, the court below recognized that the Constitution imposes no such duty.

Moreover, the court of appeals did not rely simply on the fact that there were few cases recognizing the right at the time of Owens' trial. It also noted that those courts that had decided the question had not been as unequivocal as Owens asserts. *Id.* at 730-31. One of the four cases cited by Owens in the court below and one of the two additional ones discovered by the court itself held that a defendant's refusal to consent to a search could not be used to support an inference of guilt only where the proposed search was illegal. *Anable v. Ford*, 653 F.Supp. 22, 36 (W.D.Ark. 1985); *Gomez v. State*, 572 So.2d 952, 953 (Fla.Dist.Ct.App. 1990). Although it was not an issue in the appeal, the court of appeals noted that the fact that the drug-detecting dog's positive reaction to Owens' luggage gave the police probable cause in this case. *Ex parte Owens*, 860 F.2d at 731 n.2. Further, the court found that *Powell* was distinguishable because the refusal in that case occurred while the defendant was in custody, whereas there was no dispute that Owens was not in custody when he refused consent to the search.

Clearly, the court of appeals did not hold, as Owens contends, that an attorney is constitutionally required to apply only black-letter, hornbook law. On the contrary, the court appropriately applied the *Strickland* standard to the facts presented by this case, and determined that an attorney practicing at the time of Owens' trial was not professionally unreasonable for failing to bring together disparate principles of law and scattered cases to support his argument for suppressing his client's refusal to consent to the search of his possessions. For counsel's performance to be professionally unreasonable, the

omitted action must be one that it is reasonable to expect others in his or her position to do. Anticipating changes in the law does not fall into this category.

For this reason, Owens' reliance on *Kimmelman v. Morrisson*, 477 U.S. 365 (1986), is inapposite. There, the defendant's attorney was found to be ineffective because he had not followed established procedures for suppressing incriminating evidence. The rules governing suppression of the evidence were well established, as were the discovery procedures for learning of the evidence the state intended to use, and the requirements for filing a timely motion to suppress. Counsel's performance was unreasonable because the steps he could follow and the arguments he could make were all known and readily available.

Owens' lengthy compilation of federal cases finding ineffective assistance of counsel, Petition at 11, is unavailing for the same reason. In every case, counsel was found to have been ineffective because there was clearly available, well settled authority for taking some action, yet counsel failed to act. It is readily apparent that in such instances counsel's performance is professionally unreasonable because it is reasonable to expect an attorney "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" to know and apply legal principles that are part of the established body of law. *Strickland v. Washington*, 466 U.S. at 687. The same cannot be said of the situation in this case, which required that counsel extend existing precedents and argue that they fit the facts at hand. The Constitution does not require that effective counsel go to such extremes.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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